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No. 95-554

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT W. SCARTH, *et al.*, PETITIONERS

v.

NICOR EXPLORATION COMPANY, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in light of petitioner's explicit concession that "[i]f contract interpretation were the only issue NICOR had raised[ ] *de novo* review might be the exclusive standard," and petitioner's failure to advocate any other standard of review for issues of contract interpretation, the court of appeals correctly applied a *de novo* standard of review to contract interpretation issues, rather than deferring to FERC's resolution of those issues.

2. Whether the court of appeals misapplied the substantial evidence standard to the facts of this case.

3. Whether the court of appeals misapplied state law to this case.

4. Whether the court of appeals, having concluded that FERC's own factual findings compelled judgment for NICOR as a matter of law, should have remanded this case for the pointless exercise of allowing FERC in the first instance to apply the correct legal standards, or instead rightly directed the entry of judgment for NICOR.

RULE 29.6 STATEMENT

Respondent NICOR Exploration Company no longer exists; its name was changed to SCANA Exploration Company effective June 23, 1993. Effective December 29, 1993, SCANA Exploration Company was merged into SCANA Petroleum Resources Inc., whose parent is SCANA Corporation. Before that, NICOR Exploration Company was a wholly owned subsidiary of NICOR Exploration and Production Company, which in turn was wholly owned by NICOR Oil and Gas Corporation, a wholly owned subsidiary of NICOR Inc. At all those times, NICOR Exploration Company had no non-wholly-owned subsidiaries.

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BRIEF IN OPPOSITION

The Federal Energy Regulatory Commission (FERC), whose order was overturned in the decision below, has not sought review in this Court. But petitioner Robert W. Scarth, an intervenor below, asks this Court to grant certiorari in order to reverse the Fifth Circuit on a ground that petitioner never urged below, to review the routine application of the substantial evidence test, to review the routine application of state law, and to require the Fifth Circuit to engage in the pointless exercise of remanding to the agency a case that can have only one possible outcome. In no respect has petitioner justified – indeed, in most instances petitioner has made no effort to justify – the exercise of this Court's discretionary certiorari jurisdiction. Instead, petitioner for the most part simply argues the merits of issues that he lost in the court of appeals. Not only are the issues that petitioner raises uncertworthy; they also were resolved correctly by the court of appeals.

STATEMENT

NICOR Exploration Company (NICOR) challenged petitioner's authority, under the "area rate clauses" (ARCs) of particular contracts, to charge NICOR incentive prices under stripper-well provisions of Section 108 of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3318. After a six-day hearing, an administrative law judge (ALJ) agreed with NICOR, concluding that NICOR and petitioner's predecessors did not mutually intend to permit collection of the incentive price. Pet. App. 15a-31a. FERC affirmed (Pet. App. 32a-53a), concluding that the ALJ's "Initial Decision is amply supported in the record and is fully consistent with applicable Commission and judicial precedent." Pet. App. 33a. On rehearing, however, FERC completely reversed the outcome. Pet. App. 54a-75a, 76a-99a. It rejected both the ALJ's and its own prior determinations, and held that petitioner was authorized to collect NGPA Section 108 prices.

The Fifth Circuit reversed (Pet. App. 1a-14a), holding that "the Commission failed to properly apply state contract law in construing the area rate clauses and that, under state law, Scarth failed to satisfy his burden of proof" (*id.* at 2a). Consistent with the standard of review urged on it by petitioner (Scarth C.A. Br. 27-28, *reprinted in* App., *infra*, 1a), the court of appeals accepted *all* of FERC's factual findings but applied *de novo* review to its legal determinations concerning the interpretation of the contracts under Oklahoma law. Because FERC *itself* determined, both initially and on rehearing (Pet. App. 51a, 61a-64a, 82a), that petitioner did not prove by a preponderance of the evidence that the contract language and extrinsic evidence supported his interpretation, FERC's own findings mandated judgment for NICOR as a matter of law, and the court of appeals remanded with directions to enter such a judgment. Pet. App. 2a, 14a.

1. In 1970, petitioner's predecessors – GHK, Sun, and Amerada Hess – agreed to sell their respective portions of production from the Green #1-1 Well (Green Well) in Oklahoma to NICOR's predecessor, NI-Gas Supply, Inc., which acted as the contracting arm for its corporate parent, Northern Illinois Gas Company (NI-Gas), a local distribution company (LDC). Pet. App. 33a. At that time, natural gas sales in interstate commerce typically were effected through the purchase, transportation, and resale of gas by interstate pipelines, not LDCs. Section 601(b)(1)(A) of the NGPA, 15 U.S.C. § 3431(b)(1)(A), guarantees to interstate pipelines the ability to pass through NGPA payments for gas, whether or not those payments are cost based. *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 379 n.38 (5th Cir. 1981) (*Pennzoil I*), cert. denied, 454 U.S. 1142 (1982). By contrast, NI-Gas as an LDC was not entitled to an automatic pass-through of its payments; the Illinois Commerce Commission might not permit NI-Gas to recover excessive gas acquisition costs from its customers. Ex. 7 at 2.

After GHK began negotiations with NI-Gas for the sale of production from the Green Well, GHK farmed out fractions of its working interest in the Green Well to Sun and Amerada. Ex. 21 at 3. Dan Parson and Robert Maurath, who reported to Parson, handled negotiations with all three producers for NI-Gas. Ex. 4 at 3-4; Tr. 344.

NI-Gas's negotiators emphasized that it could agree to pay only cost-justified rates. Ex. 7 at 2. The parties therefore negotiated for other economic considerations. For example, Robert Hefner, GHK's chairman, "felt GHK was stuck with low area rates." Ex. 21.

The initial contract price under the GHK, Sun, and Amerada contracts was 21¢ per Mcf. The ARCs in the Sun and GHK contracts are worded identically, and it is unclear who drafted the language. Tr. 276-277, 364, 392, 455; Ex. 102. They provide (Pet. App. 2a-3a, 71a):

> If the Federal Power Commission, or any successor governmental authority having jurisdiction in the premises, shall at any time hereafter prescribe, for the area in which the contract is located, a higher, applicable, just and reasonable area rate for the purchase of gas than the price herein provided to be paid, then the price to be paid by the Buyer to Seller for gas delivered under the provisions of this Agreement shall be increased to equal such higher price effective as of the date such higher price is made applicable to the gas sold hereunder.

The slightly different language of the Amerada contract was provided by Amerada as its "preferred language for an area rate clause." Ex. 30 at 4; Ex. 90 at 7; Tr. 297, 364, 845-846. "The only substantive difference is that the area rate clause in the Amerada Hess contract omits the phrase 'just and reasonable.'" Pet. App. 3a n.1.

2. Shortly after NICOR began purchasing gas from the Green Well, FERC's predecessor (the Federal Power Commission or FPC) established an "area rate" covering the Green Well. Opinion No. 586, 44 FPC 761 (Sept. 18, 1970). "Area rates" are maximum prices set for an entire major producing area, and were at the relevant time a major innovation in natural gas regulation. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 758 (1968). "Area rates" are necessarily *cost-based* rates. *See id.* at 761.

In late 1974 and early 1975, while NICOR was paying the established "area rate," GHK, Sun, and Amerada sought an amendment of the pricing provisions of the contracts to provide for a higher price for the gas. Exs. 31, 32. NICOR wrote GHK, Sun, and Amerada and stated that, if the *cost* of the proposed work-over was "substantially higher" than anticipated, NICOR would not oppose a request to the FPC for approval of a higher price and that NICOR "would agree to pay the increased price which is approved by the FPC." Ex. 33; see also Tr. 476. In view of NICOR's unwillingness to increase the contract price of gas from the Green Well based on non-cost factors, the proposed work-over did not proceed.

After enactment of the NGPA in 1978, NICOR began paying prices calculated under NGPA § 104, 15 U.S.C. § 3314. As the Fifth Circuit has noted, Section 104 prices are "based and inextricably linked to" previously prescribed FPC rates and simply carry forward the cost-based methodology the FPC employed in its rate proceedings. *Pennzoil I*, 645 F.2d at 380 n.39. On March 7, 1980, following enactment of the NGPA, Sun asked NICOR to amend its gas purchase contract for the Green Well to provide for "NGPA pricing." Ex. 111; Tr. 938-939. NICOR did not agree to that proposed amendment. Pet. App. 50a.

Petitioner acquired the interests in the Green Well formerly held by GHK, Amerada, and Sun in 1988 and 1989. Ex. 64. Before his acquisition of those interests, petitioner had

no relationship to the Green Well or any of the contract negotiations.

As an incentive to continue production from low-output wells, Section 108 of the NGPA provides for "stripper well" prices that are much higher than Section 104 prices, "area rates," or any other *cost-based* prices. But Section 108 prices can be charged only if the *contract*, as well as the statute, permits them.[1] Neither Sun nor Amerada ever applied for stripper classification of the well or sought stripper pricing from NICOR under Section 108. *E.g.*, Tr. 728. Petitioner, however, filed an application for Section 108 classification immediately after he began acquiring GHK's working interest. Ex. 74. Petitioner then undertook a work-over of the well and filed an application for enhanced-recovery Section 108 status. Petitioner's actions here are characteristic of his general business practice of locating older producing properties subject to contracts containing ARCs, purchasing those contract rights, and later seeking to collect NGPA § 108 prices that were not being claimed by the original sellers. Ex. 53 at 2-3; Tr. 642, 647-648. Petitioner sought to collect prices of $6.66/MMBtu, compared to market prices of approximately $1.25/MMBtu.

3. The ALJ concluded "that the ARCs in question contemplated payment and collection of only cost-based prices." Pet. App. 31a. The ALJ found (*id.* at 25a):

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[1] NGPA § 101(b)(9), 15 U.S.C. § 3311(b)(9); *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Mobil Gas Service Corp.*, 350 U.S. 332 (1956). Under the *Mobil-Sierra* doctrine, contractual authority is necessary for a seller to collect incentive prices under the NGPA, and a court on judicial review must determine whether the ARCs in question authorize collection of the maximum incentive pricing category established by NGPA § 108. *Pennzoil I*, 645 F.2d at 380-381.

> There is no substantive or material evidence in this case to substantiate Scarth's claim that NICOR did not intend to have the area rate clause include only cost-justified rates. On the contrary, the testimony of NICOR's witnesses, Parson, Maurath and Hefner, supports the contrary conclusion, that NICOR intended to pay only cost-justified rates and that the area rate clauses were intended to include only such rates.

After a "careful review of the record," the Commission held that the ALJ's "Initial Decision is amply supported in the record and is fully consistent with applicable Commission and judicial precedent." Pet. App. 32a-33a. In so holding, the Commission recognized its obligation to follow the Fifth Circuit's *Pennzoil* decisions. *Id.* at 35a n.2 (citing *Pennzoil I, supra*, and *Pennzoil Co.* v. *FERC*, 789 F.2d 1128 (5th Cir. 1986) (*Pennzoil II*)). The Commission found that NICOR had proven mutual intent under the GHK contract, and that the parties' "mutual intent * * * was that only cost-based rates were intended." *Id.* at 51a. The Commission also accepted as proven fact the proposition that "NICOR envisioned only cost-based rates." *Ibid.* Although those two conclusions were sufficient to end the case, the Commission went on to analyze the language of the ARCs and determined that it, too, supported NICOR's position. *Id.* at 51a-53a.

In granting rehearing and reversing its disposition of NICOR's protest, FERC *adhered* to its prior determination that petitioner had not shown a *mutual* intent to allow incentive rates (Pet. App. 63a-64a), specifically *rejecting* an invitation by petitioner to "go further and find that a preponderance of the evidence shows that NICOR intended to pay incentive rates under all three of the Green contracts" (*id.* at 61a-62a), because it continued to believe that "NICOR witnesses Parson and Maurath were credible" (*id.* at 63a). FERC abandoned its prior determination that NICOR had succeeded in showing mutual intent under the GHK contract (*id.* at 58a-

61a), but remained of the view that petitioner had not shown a contrary mutual intent.

FERC did not stop with a determination that petitioner had failed to meet his burden of proof, however. FERC invoked a "two-step process," foreign to the contract law of any State, under which a failure of proof on mutual intent leads the Commission to discard *all* extrinsic evidence and "decide the matter *solely* by reviewing the express terms of the area rate clause pursuant to interpretative standards established in [FERC] Opinion No. 77." Pet. App. 56a (emphasis added).[2]

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[2] Opinion No. 77, 10 FERC ¶ 61,214 (1980), is a refinement of procedures set out in FERC Order No. 23, 6 FERC (CCH) ¶ 61,229 (Mar. 13, 1979). Unlike the Order No. 23 procedures, which were adopted by rulemaking and then generally upheld in *Pennzoil I*, the Opinion No. 77 standards had never been judicially reviewed until this case. A challenge to Opinion No. 77 was dismissed without prejudice as unripe in *Pennzoil Co.* v. *FERC*, 645 F.2d 394 (5th Cir. 1981), which was simultaneous with (but not the same as) *Pennzoil I*. Opinion No. 77 provides in pertinent part:

> we will generally conclude that a contract containing an area or national rate clause does not authorize collection of all NGPA rates if it contains the following disqualifying terms:
>
> (1) It refers to rates established or prescribed by an administrative body;
>
> (2) It couples the reference to administrative action with a reference to the Natural Gas Act or the "just and reasonable" standard of that Act; and
>
> (3) It contains no additional language which has the effect of uncoupling the link between agency action and the statutory standard of the Natural Gas Act.

10 FERC at 61,398.

As to the express terms of the ARCs, FERC did not dispute its own prior determination (Pet. App. 52a) that "the most logical, most obvious, most natural and most reasonable interpretation of the * * * language" of the Amerada Hess clause is that it allows only cost-based rates. Rather, FERC held that it was *disabled* by its own precedent from accepting even the most powerful inference from contractual text, because "Opinion No. 77 requires that the required words appear on the face of the area rate clause." Pet. App. 70a-71a; see also Pet. App. 95a (absence of "the express wording required by prong two" of Opinion No. 77 is dispositive). Turning to the Sun and GHK contracts, FERC held that "there is nothing in the context of subject clauses that *can clearly* be read as excluding rates set by Congress or in any way limiting the scope of authority exclusively to rates set by an administrative body." Pet. App. 74a (emphasis added).

NICOR's application for rehearing stressed, among other arguments, that petitioner's failure to prove mutual intent was decisive and, standing alone, required a ruling in NICOR's favor. In response, the Commission reaffirmed that petitioner had not proved a mutual intent to contract for incentive-based rates. Pet. App. 82a ("here, neither of the parties could prove a mutual intent by extrinsic evidence"). Nevertheless, the Commission maintained that it was entitled to apply the Opinion No. 77 "interpretive standards" to rule in petitioner's favor. *Id.* at 92a-99a.

4. On judicial review, NICOR renewed its argument that, even if all of FERC's factual findings are accepted, NICOR is entitled to judgment as a matter of law because FERC itself *rejected*, in *each* of its orders, petitioner's position that he had met his burden of proof. NICOR freely acknowledged that FERC's factual findings are reviewed under the substantial evidence standard (albeit with extra scrutiny because the agency disagreed with the ALJ who heard the witnesses) and that FERC's construction of a statute it is charged with administering would receive "*Chevron* defer-

ence."[3] NICOR C.A. Br. 15-16 & n.7; NICOR C.A. Reply Br. 3-6. As to issues of *contract interpretation* raised by ARCs, however, NICOR pointed to an unbroken line of Fifth Circuit precedent requiring *de novo* review because FERC's jurisdiction in ARC cases is merely concurrent, not exclusive, and because the issues turn *not* on FERC's special expertise or delegated policymaking function, but on the interpretation of state law. *E.g.*, *Pennzoil I*; *Pennzoil II*; *Hunt Oil Co.* v. *FERC*, 853 F.2d 1226, 1235 (5th Cir. 1988).

Petitioner did not disagree with NICOR as to the applicable standard of review. The standard-of-review discussion in petitioner's brief – which is reprinted *in its entirety* in an appendix to this brief in opposition – was confined to a concession that *de novo* review applied insofar as the case involved legal issues of contract interpretation, and a series of mischaracterizations of NICOR's position concerning review of factual findings. See App., *infra*, 1a.[4] Petitioner con-

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[3] *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984); see also *Mobil Oil Exploration & Producing Southeast Inc.* v. *United Distribution Cos.*, 498 U.S. 211, 225 n.5 (1991).

[4] Specifically, petitioner insisted that "NICOR * * * maintains that FERC was wrong in its factual finding that the extrinsic evidence which NICOR had presented was inconclusive." App., *infra*, 1a. Although NICOR indeed believed it presented conclusive evidence of the parties' mutual intent that only cost-based rates would be charged, the main thrust of NICOR's brief was *not* that argument, but instead the logically prior argument – with which the Fifth Circuit would ultimately agree – that FERC's own findings compelled judgment for NICOR as a matter of law, because FERC itself determined that petitioner failed in his burden of proof. Given petitioner's failure to meet *his* burden of proof, it simply was not relevant whether NICOR had proved the opposite of what petitioner failed to prove. Thus, the Fifth Circuit never reached any issues concerning application of the substantial evidence standard. Nevertheless, petitioner here mischaracterizes the Fifth Circuit's decision (see Pet. 13-25) much the same way that he mischaracterized NICOR's position below.

fessed, in particular, that "[i]f contract interpretation were the only issue NICOR had raised[ ] *de novo* review might be the exclusive standard." *Ibid.* Petitioner did not cite *Chevron* or any other case applying the principles of *Chevron*; in particular, petitioner did not cite a single one of the D.C., Fourth, Seventh, and Tenth Circuit decisions that now form the centerpiece of his certiorari petition (Pet. 9-12). Nor did FERC cite any of those cases. See FERC C.A. Br. 19-21.

Applying *de novo* review (Pet. App. 10a), but without questioning any of FERC's factual findings, the Fifth Circuit reversed because FERC misapplied *state law*. Pet. App. 1a-14a. In particular, FERC threw out all of the "inconclusive" extrinsic evidence and based its holding solely on isolated phrases in the ARCs "without considering the language of the area rate clauses as a whole" (*id.* at 12a), all in contravention of applicable Oklahoma law. Furthermore,

> The ALJ concluded that Scarth failed to satisfy his burden of proof with regard to the extrinsic evidence of intent. Although the Commission accepted this finding, it applied Opinion 77's three-part formula because NICOR failed to prove that the parties mutually intended to limit rate increases to cost-based rates * * *.
>
> * * * Scarth's failure to prove by a preponderance of the extrinsic evidence that the parties mutually intended to allow non-cost-based rates would have resulted in a judgment in favor of NICOR in Oklahoma state court. *See* 5A Corbin on Contracts § 1230 at 511 (1964).

Pet. App. 12a-13a. Because "Scarth * * * failed to meet his burden of proof under Oklahoma contract law and *Pennzoil I*," Pet. App. 14a, the court remanded with directions to enter judgment for NICOR.

5. Petitioner sought rehearing and rehearing en banc in the court of appeals, but FERC did not. Instead, after the court of appeals (without dissent or even a call for a vote) denied

Scarth's petitions, Pet. App. 100a, FERC on September 19, 1995, denied petitioner's request for an increase in rates to NGPA § 108 incentive prices and ordered petitioner to refund to NICOR the excess over the applicable ceiling price that petitioner had collected from NICOR.

ARGUMENT

1. Petitioner first (Pet. 9-13) argues that this Court should grant certiorari to decide whether FERC's interpretation of a contract receives *Chevron* deference. Petitioner, however, never urged below the position that he urges here and therefore is foreclosed from making that argument. See, *e.g.*, *Sisson* v. *Ruby*, 497 U.S. 358, 359 n.1 (1990); *Delta Airlines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Furthermore, FERC – the party that might more appropriately raise this issue in a proper case – has not itself petitioned for certiorari. And, notwithstanding the cases petitioner cites, it is clear that *no* court would give deference to FERC's vacillating construction of the contracts at issue in this case.

In a case involving the construction of an ARC, no court has *ever* deferred to FERC's interpretation. The cases that petitioner cites all involve kinds of contracts or clauses *other than* ARCs in gas purchase contracts, generally species of contracts – such as "settlement agreements"[5] or FERC tar-

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[5] *E.g.*, *National Fuel Gas Supply Corp.* v. *FERC*, 811 F.2d 1563 (D.C. Cir.), cert. denied, 484 U.S. 869 (1987); cf. *Consolidated Gas Supply Corp.* v. *FERC*, 745 F.2d 281, 291 & n.23 (4th Cir. 1984) (in case involving FERC-approved settlement agreement, tentatively suggesting some deference but also noting that "we have no occasion to retreat behind agency deference, though, were we to do so, it would only reinforce the result reached on a more direct and lawyerlike basis"), cert. denied, 472 U.S. 1008 (1985). Settlement agreements – that is, agreements settling disputes that otherwise would be adjudicated *before FERC* – present a more compelling case in general for deference to FERC than do ARCs, which simply govern the price of a transaction between a buyer and a seller in a regulated field and, in the event of disputes, need not

iffs[6] – that pertain uniquely to the FERC regulatory process and thus present a much different case for deference than ARCs.[7] In some of those cases, moreover, the court did *not* defer to FERC on questions of law. *E.g., Amoco Production Co.* v. *FERC*, 765 F.2d 686, 690 (7th Cir. 1985) ("[O]ur deference is not nearly so marked as it would be in reviewing a purely regulatory determination of the Commission * * *. Our task is to find whether the Commission's

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even be adjudicated before FERC. Some settlement agreements present particularly compelling cases for deference. See *National Fuel Gas*, 811 F.2d at 1571 ("A further reason, at least in this case, for this court to defer to the Commission's reading of this settlement agreement is that Congress required the Commission to take an active role in approving the agreement.") The Fifth Circuit itself has deferred to FERC's construction of settlement agreements in appropriate cases. See, *e.g.*, *El Paso Natural Gas Co.* v. *FERC*, 881 F.2d 161, 164 (5th Cir. 1989) ("In support of its construction of the 1985 settlement in the instant case, the Commission relies not only on the language of the 1985 settlement itself but also on agency expertise; therefore, some deference to the interpretation by the Commission of the 1985 settlement is warranted.").

[6] *E.g., Northwest Pipeline Corp.* v. *FERC*, 61 F.3d 1479, 1486 (10th Cir. 1995); *Natural Gas Clearinghouse* v. *FERC*, 965 F.2d 1066, 1070 (D.C. Cir. 1992). There is no basis whatever for petitioner's attempt, via bald assertion, to equate the ARCs in his contracts, private agreements that simply exist in a regulated field, with tariffs placed on file at an agency. See Pet. 10 (asserting that "Scarth's contracts with NICOR are its FERC tariffs").

[7] In *Pacific Gas & Electric Co.* v. *FERC*, 746 F.2d 1383, 1387 (9th Cir. 1984), in a context far afield from the present one, the court deferred to FERC's construction of a contract governing electricity transmission service over the Pacific Northwest-Southwest Intertie "[b]ecause the FERC interpretation was so clearly based upon the agency's expertise in electricity transmission regulation." That holding is of no assistance to petitioner here, because the agency in this case did not rely on any factual or technical expertise. See Pet. App. 10a. Instead, it "decide[d] the matter *solely* by reviewing the express terms of the area rate clause." Pet. App. 56a (emphasis added).

interpretation of the contract was reasonable *and in full conformance with law.*") (emphasis added).

The D.C. Circuit, the leading court championing deference to FERC contractual interpretations in certain cases,[8] has *not* deferred to FERC when it has considered ARCs. Rather, in *Associated Gas Distributors* v. *FERC*, 810 F.2d 226 (D.C. Cir. 1987) (Ruth Bader Ginsburg, J.), and *South Dakota Public Utilities Commission* v. *FERC*, 934 F.2d 346 (D.C. Cir. 1991), cert. denied, 112 S. Ct. 1244 (1992), the court addressed FERC's treatment of ARCs *without* any deference to the Commission's legal conclusions. In neither of those cases did the court cite *Chevron* or any of the D.C. Circuit's decisions applying *Chevron* to FERC interpretations of certain contracts; instead, the D.C. Circuit has consistently cited with approval the very Fifth Circuit *Pennzoil* opinions that petitioner now attacks. See 810 F.2d at 229, 230 & n.2, 231 & n.4, 233; 934 F.2d at 349, 353.

Most pointedly, Judge (now Justice) Ginsburg stated for the court in *Associated Gas Distributors* that "[w]hat is no longer arguably in court as a result of the 1981 *Pennzoil* decision is the appropriateness of using a private contract frame of reference and, particularly, the intent-based standards of private contract law." 810 F.2d at 231 n.4. Thus, contrary to petitioner's claim, the D.C. Circuit joins the Fifth Circuit in recognizing that ARC cases, although they sometimes may happen to be tried before an administrative agency rather than a court, are private contract disputes to be resolved according to the usual means of deciding such disputes (including *de novo* judicial review of questions of law), not governmental decisions to which *Chevron* applies.[9]

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[8] See *Williams National Gas Co.* v. *FERC*, 3 F.3d 1544 (D.C. Cir. 1993); *National Gas Fuel Supply Corp.* v. *FERC*, *supra*.

[9] The D.C. Circuit has also limited its deference holdings to situations in which "FERC * * * is reading the contract term for a limited regula-

And, because the other circuits whose decisions petitioner cites have followed the D.C. Circuit's non-ARC precedents[10] – and have not been addressing ARC cases – petitioner's claim of a circuit conflict evaporates.

The Fifth Circuit's *Pennzoil I* analysis explains – in a manner never questioned by any other circuit – why ARCs do *not* present a good case for deference to FERC. Under the complex regulatory scheme of the Natural Gas Act of 1938 (NGA), 15 U.S.C. § 717, *et seq.*, and the NGPA, gas purchase contracts sometimes will – and sometimes will not – be within FERC jurisdiction to interpret. 645 F.2d at 380-382. Thus, ARCs in gas purchase contracts, unlike various other kinds of contractual provisions that FERC may interpret, will be "left to state or federal courts" in many instances. *Id.* at 382. It follows that it would be illogical either to apply a specially made body of federal law to ARC disputes, or to defer to FERC's interpretation:

> *Erie* is necessarily implicated in this case because FERC has concurrent jurisdiction with state and federal courts over interpretation of escalation provisions in contracts that remain within FERC's NGA jurisdiction, and because only courts have jurisdiction to interpret escalation provisions in contracts not within FERC's NGA jurisdiction * * *. The very evil that *Erie* addressed would arise if FERC followed one substantive rule while state courts followed another: parties whose contracts are within concurrent FERC and court jurisdiction would be

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tory purpose, * * * and not to determine the parties' ultimate contractual rights and responsibilities." *Transwestern Pipeline Co.* v. *FERC*, 988 F.2d 169, 173 (D.C. Cir. 1993); accord *Williams*, 3 F.3d at 1550. In ARC cases, FERC determines the parties' ultimate contractual rights and responsibilities.

[10] *E.g.*, *Northwest Pipeline Corp.*, 61 F.3d at 1486 ("we adopt the reasoning of the District of Columbia Circuit as applied in *Williams*").

> subject to two different rules for the same conduct, and each would have an incentive to have their contract interpreted in the forum applying the rule most favorable to that party.

Id. at 384; see also *id.* at 385-386 & nn.53-54; *Pennzoil II*, 789 F.2d at 1135-1136.

In any event, even if ARCs were indistinguishable from other kinds of contracts, to whose interpretation by FERC some circuits have given deference, *this case* would be an inappropriate occasion for deferring to FERC's interpretation, because of FERC's vacillating interpretation of the contracts at issue. The argument supporting deference to FERC on issues of contract interpretation can be traced back, directly or indirectly through *Williams Natural Gas*, to Judge Bork's opinion for the D.C. Circuit in *National Fuel Gas Supply Co.* v. *FERC, supra*. As Judge Bork was careful in that case to point out, "deference would be inappropriate * * * [i]f the agency's interpretation of a contract has vacillated." 811 F.2d at 1571.

It is difficult to imagine a more compelling instance than this case of a "vacillat[ing]" FERC interpretation not entitled to deference under even the most generous of standards. FERC originally *affirmed* the ALJ's ruling in NICOR's favor, calling it "amply supported" (Pet. App. 33a) and citing in particular "the most logical, most obvious, most natural and most reasonable interpretation of the * * * language" of the clauses (*id.* at 52a). Yet, on rehearing, the *very same language* was construed as dispositive *against* NICOR. Such flagrant inconsistencies defeat an agency's claim to deference even when a *statute* is at issue. See, *e.g.*, *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 212-213 (1988).

It is hardly surprising, then, that FERC has not come to this Court seeking review of the Fifth Circuit's no-deference holding in this case. Only the disappointed intervenor –

who did not raise the issue below – urges this Court to resolve a supposed conflict in the circuits. But that conflict is illusory in this case; *no court* would have deferred to FERC's construction of the ARCs at issue here. There is no sufficient reason to grant certiorari on this issue.

2. Petitioner's second argument, made at great length (Pet. 13-25), is that the Fifth Circuit misapplied the substantial evidence standard of review. The short answer is that the Fifth Circuit had no occasion to misapply (or even to apply correctly) the substantial evidence standard, because it accepted, for the sake of disposition, every single one of the agency's factual findings. The *only* factual finding that ultimately mattered in this case – and one the agency reaffirmed repeatedly (Pet. App. 51a, 61a-64a, 82a) – was that petitioner failed to prove his position by a preponderance of the evidence. See Pet. App. 12a-13a.[11]

Petitioner's disagreement with the application of the substantial evidence standard by the court of appeals would not warrant a grant of certiorari even if the Fifth Circuit *had* applied that standard and disagreed with some of the agency's conclusions. "[A] question of fact * * * does not merit Court review." *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (dismissing cross-petition as improvidently granted); *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) (per curiam) (review of facts "would be of no importance save to the litigants themselves"). See generally R. STERN, E. GRESSMAN,

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[11] Petitioner complains repeatedly that the Fifth Circuit did not advert to certain FERC conclusions that petitioner labels (often fancifully) "*factual finding[s].*" Pet. 17 n.12, 18, 19, 20 & n.15. The reason the Fifth Circuit did not advert to those conclusions is that they were *legally irrelevant* under the Fifth Circuit's analysis, not that the Fifth Circuit rejected them as factually unsupported. *Nowhere* in the Fifth Circuit's opinion is any FERC factual finding questioned in the slightest.

S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 189-191 (7th ed. 1993).

3. Petitioner's third argument (Pet. 25-29) -- that the court of appeals misapplied Oklahoma law to construction of the contracts – presents no ground for a grant of certiorari. "[T]he interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review." *Volt Information Sciences, Inc.* v. *Board of Trustees*, 489 U.S. 468, 474 (1989); see also *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); *Butner* v. *United States*, 440 U.S. 48, 57-58 (1979); *Cort* v. *Ash*, 422 U.S. 66, 73 n.6 (1975); SUPREME COURT PRACTICE, *supra*, at 183-184.

Furthermore, petitioner's attacks on the court of appeals' application of Oklahoma law rest on a series of misstatements. Petitioner claims, for example, that NICOR "drafted the GHK and Sun ARCs" (Pet. 28), but FERC did not so find, and the record is far from clear on this point (Tr. 276-277, 364, 392, 455; Ex. 102). Petitioner claims that "FERC * * * properly considered *all* of the evidence, * * * and found that the greater weight of *all* evidence proved that Scarth met his burden" (Pet. 26), yet that is not what FERC did. Indeed, FERC neither considered all the evidence not found that such evidence discharged Scarth's burden of persuasion. By its own admission (Pet. App. 56a), FERC disregarded all of the extrinsic evidence merely because it was "inconclusive" and rested on the ambiguous contract language alone, in contravention of multiple Oklahoma statutes and cases cited by the court of appeals (Pet. App. 10a-11a). And FERC's disregard for normal and Oklahoma-specific principles of construction did not end there; FERC also refused to interpret contractual language in its "most logical" and "most natural" way (Pet. App. 52a), because it preferred the artificial linguistic straitjacket of FERC Opinion No. 77. Pet. App. 70a-71a, 95a. Although petitioner claims that FERC acted consistently with Oklahoma law in applying "construction rules" (Pet. 27), petitioner does not and cannot

make any effort to show that the bizarre construction rules FERC applied have a basis in Oklahoma law. Petitioner's effort to reconcile FERC's decision with Oklahoma law is remarkably strained and, in any event, presents no cert-worthy issue.

4. Finally, petitioner argues in a single paragraph (Pet. 29-30) that the court of appeals exceeded its authority by remanding with directions instead of remanding for further proceedings. Although petitioner claims that the decision below "usurps administrative discretion" (Pet. 30), petitioner fails to identify *what* discretion it thinks FERC would have had left to exercise once the court of appeals ruled that petitioner's failure to meet his burden of proof was dispositive. There were no issues remaining for administrative resolution, and a remand to the agency would have been pointless – as the agency itself seems to believe, since it neither petitioned for further review nor hesitated to comply with the mandate of the court of appeals.

Petitioner correctly states the *general* principle of administrative law that a reviewing court must remand to an agency once its decision has corrected the agency's error of law. But there is nothing absolute about that principle,[12] and it certainly is not a principle designed to create unnecessary work for agencies (much less for this Court on certiorari) when a case can have only one outcome under the governing legal principles. FERC – not the court of appeals – found the key fact here, namely that petitioner had not met his burden of proof. The court of appeals held that that fact, found by FERC, disposed of the case. Pet. App. 12a-13a. There was nothing left for FERC to do, and a remand would

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[12] Courts of appeals have on several occasions remanded cases to agencies with directions to enter a particular judgment or order. *E.g.*, *Hunt Oil Co.* v. *FERC*, *supra*; *Rivera* v. *Sullivan*, 923 F.2d 964, 970 (2d Cir. 1991); *AFGE* v. *FLRA*, 786 F.2d 554, 557 (2d Cir. 1986); *Diamond Ring Ranch, Inc.* v. *Morton*, 531 F.2d 1397, 1407 (10th Cir. 1976).

have been pointless. A grant of certiorari would be even more so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Excerpt (pp. 27-28) from "Brief of Intervenor, Robert W. Scarth, et. [*sic*] al."

II. FERC PROPERLY INTERPRETED THE ARC'S IN THIS CASE AS PERMITTING NGPA INCENTIVE PRICES

A. Standard of Review

NICOR maintains that "[t]his Court's review is *de novo*" because "[t]he sole underlying question" is "one of contract interpretation." Br. at 15. If contract interpretation were the only issue NICOR had raised, *de novo* review might be the exclusive standard. However, NICOR also maintains that FERC was wrong in its factual finding that the extrinsic evidence which NICOR had presented was inconclusive. Br. at 24-37. FERC's resolution of issues of fact, unlike its resolution of issues of law, are [*sic*] reviewed under the substantial evidence standard. *Hunt*, 853 F.2d at 1235. Substantial evidence is such evidence that a "reasonable mind might accept as adequate to support a conclusion," and is "less than the weight of the evidence." *Pennzoil II*, 789 F.2d at 1135, n.20. Substantial evidence is "more than a mere scintilla, and less than a preponderance," and "'[t]his Court may not reweigh the evidence or try the issues de novo. Conflicts in evidence are for the [agency] and not the courts to resolve.'" *Spellman v. Shalala*, 1 F.3d 357, 360 (5th Cir. 1993) (citation omitted). Thus, FERC's finding of inconclusiveness as to NICOR's extrinsic factual evidence is reviewed under the substantial evidence standard, and not *de novo* as NICOR maintains.

Finally, Scarth concurs in FERC's position in its brief (pp. 19-21) that no "special scrutiny" is required because FERC concurred with the ALJ (*see also* § (C)(1), *infra*), and that deference to FERC is appropriate in view of its specialized expertise, particularly with respect to interpreting and applying its own rules and orders. In any event, as Scarth shows below, even if *de novo* review is applied, the plain contractual language, regulatory and commercial context, and course of performance of the parties show that *all* NGPA prices are contractually authorized.